IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 10, 2009

WILLIAM H. VAUGHAN, IV v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Maury County
No. 14589 Stella L. Hargrove, Judge

No. M2008-01211-CCA-R3-PC - Filed November 4, 2009

Petitioner, William H. Vaughn, IV, appeals the dismissal of his petition for post-conviction relief in which he alleged that he received ineffective assistance of counsel at trial. Specifically, Petitioner contends that Counsel was not prepared for trial because Counsel did not prepare a script for Petitioner's direct testimony, and Counsel failed to cross-examine a co-worker about whether he smelled gasoline on petitioner's uniform after the victim's death. After a thorough review of the record, we conclude that Petitioner has failed to show that his trial counsel rendered ineffective assistance of counsel and affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Robert C. Richardson, Jr., Columbia, Tennessee, for the appellant, William H. Vaughan, IV.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B, Marney, Assistant Attorney General; Michel Bottoms, District Attorney General; Patrick Butler, Assistant District Attorney General, and Richard Dunavant, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

After his first trial, Petitioner was convicted of first degree premeditated murder and aggravated arson by a Maury County Jury. On appeal, a panel of this Court reversed and remanded for a new trial because the trial court erred in admitting hearsay testimony, and the trial court failed to comply with the procedural guidelines set forth in Momon v. State, 18 S.W.3d 152 (Tenn. 1999).

See State v. Vaughn, 144 S.W.3d 391, 405-13 (Tenn. Crim. App. 2003). Following a second jury trial, petitioner was again convicted of first degree murder and aggravated arson. On direct appeal, in considering whether the evidence was sufficient to support petitioner's convictions, this Court summarized the facts surrounding the convictions as follows:

> [T]he victim died of a single gunshot wound to the right temple while she was asleep in her bedroom sometime in the early morning hours of April 19, 2000. There was no sign of a forced entry into the victim's house, and no indication of a struggle before the victim was shot. The bullet was fired from the .25 caliber handgun purchased by Defendant on Friday, April 14, 2000 in Lewisburg. Mr. Jones testified that he saw Defendant in Pulaski on Saturday, April 15, 2000, and Defendant showed him the newly purchased handgun.
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> Ms. Burden testified that Defendant worked from 5:00 p.m. to midnight on April 18, 2000, and that he was dressed in his company uniform. When Ms. Burden arrived at her workplace the next morning, April 19, 2000, she noticed that one of the flashlights used to escort the Deloitte employees to their cars was missing. Defendant returned the flashlight to James Rutherford at some point after the victim's death. Defendant spoke with his father after he arrived at work on April 19, 2000, at approximately 5:00 p.m. Defendant's father told Defendant about the fire and his mother's death. Mr. Asher said that Defendant did not show any emotion during his telephone conversation with his father.
>
> Officers Helton and Chapman testified that when they responded to the report of a fire at the victim's house at approximately 3:15 a.m. on April 19, 2000, the fire was primarily contained in the southwest corner of the second floor where the victim's bedroom was located. The proof established that two separate fires were started with gasoline in the victim's house. One fire was set in the rear bedroom located in the northwest corner of the house, and the second fire was started in the victim's

bedroom in the southwest corner of the house. The burn patterns in both rooms indicated floor level fires. Officer Wilson testified that the perpetrator poured gasoline from the doorway of the victim's bedroom, in and around the furniture, and on the bed and bedding itself.

At noon on Friday, April 21, 2000, Defendant purchased a second handgun of the same caliber as the gun purchased on April 14, 2000. Samples and items taken from Defendant's vehicle on April 21, 2000, revealed the presence of a gasoline range product on the shirt, pants and coat comprising his Dynamic Security Services' uniform; the floor mat and carpet from the driver's side of the vehicle, and the floor mat from the vehicle's back seat. A plastic gasoline container was found in Defendant's trunk along with a spray can of disinfectant and a spare fuel spout designed for use with a plastic gasoline container.

State v. William Henry Vaughan, IV, No.M2004-01718-CCA-R3-CD, 2006 WL 2380621, at *12 (Tenn. Crim. App., at Nashville, Aug. 16, 2006), perm. app. denied (Dec. 18, 2006).

II. Post-Conviction Hearing

Petitioner testified that he graduated from Middle Tennessee State University with a major in psychology and a minor in business law. Trial counsel in this case ("Counsel") was appointed to represent him prior to the motion for new trial following his first conviction. Petitioner agreed that Counsel was able to get his first conviction reversed on appeal.

Petitioner testified that in preparation for the second trial, he did not really talk with Counsel, and he let counsel handle everything. He and Counsel had discussed whether to call Edward Huskey, a ballistics expert who testified at the first trial, but they decided Huskey would not help Petitioner's case. Petitioner testified that he wanted to make certain that Counsel cross-examined Bruce Asher at the second trial. He felt that Asher should have been questioned, as he was at the first trial, about

the fact that he did not smell gasoline on Petitioner's uniform, which the prosecution claimed was "saturated with gas." Petitioner testified that he spoke with Counsel both before and during the trial about questioning Asher, but Counsel "didn't want to do it." He admitted that Mr. Asher's direct testimony was not "all that damaging."

Petitioner testified that he wrote a letter to Counsel and expected that he and Counsel would use the same question and answer format that was used at the hearing on the motion for new trial during his direct testimony. Petitioner said that he typed the questions and answers out word for word. However, Counsel said that he would not use the script, and he wrote out a one page list of ten topics for Petitioner to use. Petitioner testified that they reviewed the list "maybe" thirty minutes before trial. As a result, Petitioner said that he was anxious during the first four days of trial, and his direct testimony did not go well. He felt that his credibility was damaged because Counsel did not know when he was finished answering a question, and Counsel had to remind him to slow down. Petitioner admitted that he never told the trial court that he was not satisfied with Counsel's representation.

Counsel testified that he was appointed to represent Petitioner after Petitioner was convicted in the first case. He raised ineffective assistance of counsel in relation to a Momon issue, and Petitioner was granted a new trial by a panel of the Court of Criminal Appeals. Counsel testified that he was originally appointed as elbow counsel because Petitioner had filed numerous documents on his own. He sent Petitioner a letter in August of 2001 chastising Petitioner for all of the documents that he was filing in court.

Counsel testified that at the hearing on the motion for new trial, Petitioner had typed up a script with questions and answers mainly about his original trial counsel. Counsel said that he advised Petitioner that the script was a bad idea, but he did as Petitioner requested. Petitioner wanted to use the same format at the second trial. Counsel said: "And I told him, I said, I can't do a script like this, asking you questions. And I think it is a horrible, terrible idea to sit in front of a jury and read your answers back." Counsel testified that Petitioner also wanted to read portions of

the appellate opinion to the jury. He told Petitioner that he would not use a script, but he agreed to draft an outline, and he gave a copy of it to Petitioner. Counsel testified that the outline covered everything that needed to be discussed at trial. He felt that the State would have used the script against Petitioner at trial.

Counsel testified that he did not specifically recall anything about Bruce Asher's testimony, and he did not recall Petitioner requesting that he question Asher. He did not see any reason why he would have refused to ask Asher certain questions. Counsel thought that Asher was one of the security guards present when Petitioner received a call that his mother, the victim, was dead. Counsel testified that Petitioner wrote him a letter and was pleased with the issues raised in his brief on appeal, and he asked Counsel to represent him on post-conviction.

III. Standard of Review

A petitioner seeking post-conviction relief must establish his allegations by clear and convincing evidence. T.C.A. § 40-30-210(f). However, the trial court's application of the law to the facts is reviewed de novo, without a presumption of correctness. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). A claim that counsel rendered ineffective assistance is a mixed question of fact and law and therefore also subject to de novo review. Id.; State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999).

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, he must establish that counsel's performance fell below the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). In addition, he must show that counsel's ineffective performance actually adversely impacted his defense. Strickland v. Washington, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984). In reviewing counsel's performance, the distortions of hindsight must be avoided, and this Court will not second-guess counsel's decisions regarding trial strategies and tactics. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). The reviewing court, therefore, should not conclude that a particular act

or omission by counsel is unreasonable merely because the strategy was unsuccessful. Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. Rather, counsel's alleged errors should be judged from counsel's perspective at the point of time they were made in light of all the facts and circumstances at that time. Id. at 690, 104 S. Ct. at 2066.

A petitioner must satisfy both prongs of the Strickland test before he or she may prevail on a claim of ineffective assistance of counsel. See Henley v. State, 960 S.W.2d 572, 580 (Tenn. 1997). That is, a petitioner must not only show that his counsel's performance fell below acceptable standards, but that such performance was prejudicial to the petitioner. Id. Failure to satisfy either prong will result in the denial of relief. Id. Accordingly, this Court need not address one of the components if the petitioner fails to establish the other. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

IV. Analysis

Initially, Petitioner contends that he received the ineffective assistance of counsel because Counsel refused to use a question and answer script during Petitioner's direct examination at the second trial. He argues that this tactic was successful at his hearing on the motion for new trial in his first case, and he was expecting the same procedure to be used in the second trial. Petitioner asserts that his credibility was damaged before the jury because he was unable to prepare himself before the trial began, and Counsel was unprepared for his answers.

At the post-conviction hearing, Counsel testified that he reluctantly agreed to use a question and answer script, typed out by Petitioner, at the hearing on the motion for new trial in the first case. Most of the questions involved Petitioner's original trial counsel. Petitioner wanted to use the same format at the second trial. Counsel testified that he advised Petitioner that it was a "horrible, terrible idea to sit in front of a jury and read your answers back." He felt that the State would have used the script against Petitioner at trial. Counsel testified that he agreed to draft an outline, which he gave to Petitioner. The outline covered everything that he and Petitioner needed to discuss at trial.

The post-conviction court accredited Counsel's testimony and found that Counsel "is a seasoned criminal defense lawyer of some fifteen (15) years. The Court will not question his trial strategy." On appeal, this Court may not second-guess the tactical or strategic choices of counsel unless those choices are based upon inadequate preparation, nor may we measure counsel's behavior by 20-20 hindsight. See State v. Hellard, 629 S.W.2d 4, 9 (Tenn. 1982). Typically, allegations of ineffective assistance of counsel relating to matters of trial strategy or tactics do not provide a basis for post-conviction relief. Taylor v. State, 814 S.W.2d 374, 378 (Tenn. Crim. App. 1991). In this case, Counsel's decision not to use the script was a reasoned, strategic choice. Therefore, we conclude that trial counsel's refusal to use the question and answer script prepared by Petitioner did not render counsel's representation ineffective.

Next, Petitioner contends that counsel was ineffective for failing to adequately cross-examine his co-worker, Bruce Asher, at the second trial. At the first trial, Mr. Asher testified that he did not notice the smell of gasoline on Petitioner's uniform when Petitioner reported to work on the day of the victim's death. Petitioner essentially claims that this testimony would have rebutted the State's claim that he used gasoline to set fire to the victim's residence to conceal the murder.

At the post-conviction hearing, Petitioner claimed that he told Counsel at the second trial that he wanted Mr. Asher questioned on cross-examination about whether he smelled gasoline on Petitioner's uniform on the day of the victim's death. However, he claimed that Counsel "didn't want to do it." Petitioner admitted that Asher's direct examination was not "all that damaging" to his case. Counsel testified that he did not specifically recall anything about Mr. Asher's testimony, and he did not recall Petitioner asking him to question Asher. Counsel did not see any reason why he would have refused to ask Asher certain questions.

Concerning this issue, the post-conviction court held:

> With regard to the issue of cross-examination of Bruce Asher, Petitioner testified at this hearing that the direct examination of Mr. Asher was not all that damaging. Mr.

> Asher was a fellow security guard of Petitioner, whom Petitioner says should have smelled gasoline on Petitioner's uniform. Mr. Koger testified that he had no recollection of Petitioner ever raising an issue about Mr. Asher's direct examination, and his reluctance or refusal to raise this matter was never an issue. The Court finds that this ground has no merit.

Based on the record, we conclude that the evidence does not preponderate against the post-conviction court's findings that trial counsel's assistance was not deficient. Even assuming, arguendo, that counsel rendered deficient representation, Petitioner had not established that he was prejudiced as a result of trial counsel's failure to cross-examine Bruce Asher. Petitioner is not entitled to relief on this issue.

CONCLUSION

For the foregoing reasons, the judgment of the post-conviction court is affirmed.

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THOMAS T. WOODALL, JUDGE